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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 248.

FLOYD FARMER, Administrator of the Estate of Donald Lewis Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Moore, Federal Practice, Second Edition, Volume 6, page 3818 15
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Rules Cited.

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WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
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vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

Petitioners, Floyd Farmer, Administrator, and Willie Farmer, Administrator, seek the issuance of a writ of certiorari to review an order entered by the United States

Court of Appeals for the Sixth Circuit, which order sustained judgments of the United States District Court for the Middle District of Tennessee for the defendant, Louisville and Nashville Railroad Company, in each of the above two cases, entered on jury verdicts in two wrongful death actions all growing out of a crossing accident. In affirming the judgments of the lower court, the United States Court of Appeals for the Sixth Circuit affirmed the trial court's **exercise of discretion** in determining that he could properly pass upon the plaintiffs' motions for a new trial pursuant to Rule 63 of the Rules of Civil Procedure, even though he did not preside over the actual jury trials, but, the trial judge, who actually presided over the jury trials which resulted in favorable verdicts for the defendant Railroad Company, died subsequent to such trials and prior to the time the plaintiffs' motions for a new trial were filed. The Court of Appeals for the Sixth Circuit also affirmed the trial court's exercise of discretion in overruling the plaintiffs' motions for a new trial under Rule 59 which contained various grounds as set forth therein.

It is the action of the Court of Appeals for the Sixth Circuit, in affirming the said **exercise of discretion** by the trial court in refusing to grant the plaintiffs a new trial under said Rule 63, and affirming the trial court's **exercise of discretion** that he could perform the duties related to ruling on the plaintiffs' motion for a new trial, even though he did not preside at the trials, that is sought to be reviewed by the petition in this matter.

OPINION BELOW.

There was no written opinion in the Court of Appeals for the Sixth Circuit, but a copy of the Court of Appeals' order denying the appellants' appeal is attached hereto as Appendix A.

JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this Court under Title 28, U. S. C. A., Section 1254 (1).

It is respectfully submitted that the question presented by the petitioners merely relates to a matter of the trial court's **exercise of discretion** in two damage suits by the trial court and the affirmance of that **exercise of discretion** by the Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE.

The two cases were brought by two administrators for the death of two teenage boys, cousins, both by the name of Farmer. The two boys were killed when an automobile in which they were riding and which was being driven by Thomas Donald Farmer, stopped or virtually stopped at a point of safety, about eight or ten feet from the path of the train, with the automatic crossing signal lights and bell warning of the approach of the train, and then suddenly made a "lunge" into the path of the train. At the point where the boys stopped, or virtually stopped, they could have seen the approaching train four hundred or five hundred feet down the track. The headlight on the engine was burning and the MARS, or revolving, light was on and revolving. The horn was blowing. In spite of these clear warnings of the approaching train, the car "jumped" into the path of the train. (Testimony of plaintiffs' witness **Ashbranner**, a Springfield policeman, Appellee's Appendix, pp. 12b, 13b, and 14b; testimony of plaintiffs' witness **Crawford**, who was an occupant of the ill-fated car, Appellee's Appendix, pp. 16b, 17b, 18b, 19b, and 20b.) Thomas Donald Farmer, the operator of the automobile was killed. His cousin, Donald Lewis Farmer, who was sitting on the front seat, was also killed. Clay Baker, another of the occupants who survived, testified

that when they stopped, or virtually stopped, at a point of safety, about three yards from the side track (the main track on which the accident occurred was the second track the boys would have reached, and when the crossing signals were in operation warning of the approach of trains, the Farmer boy who was a passenger, shouted "Go Ahead". The Farmer boy who was driving the car "mashed the gas down" and the car "jumped out" onto the tracks into a collision with the train. (Appellee's Appendix, pp. 53b, 54b, 55b, 56b, and 57b.)

The evidence was undisputed that when these boys came to a stop, or virtually to a stop, at a point of complete safety, the crossing signals were working, the lights flashing, and the gong ringing, and the approaching train, with its lights burning and its horn blowing, was clearly visible and audible to the operator of the car and the occupants of the car.

ARGUMENT.

The cases were tried before the Hon. Elmer Davies and, as stated hereinabove, verdicts for the defendant Railroad Company were brought in by the jury in both cases. Judgments on the verdicts were not entered promptly because of the request of plaintiffs' attorney that he be given more time in which to prepare his motions for a new trial as, by that procedure, the commencing of the ten day period of time would be delayed. This was a matter of accommodation to opposing counsel. As stated in opposing counsel's petition, Judge Davies died before plaintiffs' motions for a new trial were filed.

The sole question presented by this petition is the correctness of the action of the Hon. William E. Miller, who succeeded Hon. Elmer Davies as United States District Judge for the Middle District of Tennessee, in exercising his discretion as provided and set forth in Rule 63 of the Rules of Civil Procedure, and in determining, under this record which was transcribed and filed, that he could satisfactorily and fairly pass upon the questions raised by the plaintiffs' counsel in his motions for a new trial filed on behalf of the plaintiffs.

In the petition for a writ of certiorari, opposing counsel appears to take two positions which are, to some extent, in any event, somewhat inconsistent. These positions are:

(1) That the exercise of the power of a successor judge to pass on a losing parties' motion for a new trial, pursuant to Rule 63, in any jury case where there is a sharp conflict of evidence, is an unconstitutional infringement of a party's constitutional right to a trial by a jury; and,

(2) That "rightly construed" Rule 63 of the Federal Rules of Civil Procedure is not in conflict with the "Seventh Amendment", but the trial judge, in exercising

his discretion that he could rightfully perform the duties of the court in ruling on the plaintiffs' motion for a new trial, pursuant to Rule 63, abused his discretion, and acted arbitrarily.

The basic validity of Rule 63, which expressly empowers a successor judge to perform such duties as entering a judgment and passing on motions for a new trial, after the verdict is returned, has been so well established that, in the last analysis, we respectfully insist that this petition is simply an effort to get this Court to review that exercise of discretion by the trial court, which exercise of discretion was affirmed by the Circuit Court of Appeals for the Sixth Circuit.

Validity of Rule 63.

The Statutes formerly made provision for the hearing and determination of motions for a new trial by the successor of the trial judge. (28 U. S. C. 776, U. S. Rev. St., Section 953.) Rule 25 of the Rules of Criminal Procedure is the same as Rule 63 applicable to civil cases.

This same contention made by opposing counsel was made in the criminal cases involving the Messrs. Connelly and Caudle (249 F. 2d 576).:

> "It is urged that the successor judge was not qualified to pass upon the pending motions, particularly their motions for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, because not having presided at the trial of the case he did not have the 'feel of the case.' "

The Court of Appeals for the Eighth Circuit, after citing and referring to a large number of decisions which have consistently upheld the validity of U. S. Rev. St., Section 953, Rule 63 of the Civil Rules of Procedure, and Rule 25 of the Criminal Rules of Procedure, squarely rejected the same contention made by the opposing counsel in this case.

"The law governing the situation here presented was strictly complied with and we think that law provided due process within the requirements of the Fifth Amendment. Meldrum v. United States, 9 Cir., 151 F. 177; Chin Wah v. United States, 2 Cir., 13 F. 2d 530; King v. United States, 6 Cir., 25 F. 2d 242; Owens v. Hunter, 10 Cir., 169 F. 2d 971; McIntyre v. Modern Woodmen of America, 6 Cir., 200 F. 1; Pessagno v. Euclid Inv. Co., D. C. D. C. 35 F. Supp. 743; United States v. Green, D. C. S. D., Ill., 143 F. Supp. 442. In Meldrum v. United States, supra, the authority of a succeeding judge to pass upon a motion for a new trial in a federal criminal case tried before another judge who died while the motion was pending was expressly sustained. In the course of the opinion in that case it is said (151 F. 182):

"'Did the judge of the court below have authority to pass upon the motion for a new trial and impose the sentence? The plaintiff in error contends that he did not, that he had not participated in the trial, and that the right of the plaintiff in error to have the judge who presided at his trial take part with the jury at every step in the determination of his guilt or innocence was a fundamental right which could not be taken away by an act of Congress, . . .

. . . . . .

"and it (Sec. 955 of the Revised Stat.) further provides that if said judge is satisfied that, owing to the fact that he did not preside at the trial or for any other cause, he cannot fairly pass upon said motion and allow and sign said bill of exceptions, he may in his discretion grant a new trial. If the succeeding judge can, as undoubtedly he may under this statute, deny a motion for a new trial, there can be no question of his power to further proceed in the case and render judgment upon the verdict."

"We conclude that the contention that Judge Nordbye was disqualified to perform the duties to be performed by the presiding judge after verdict is without merit."

The Connelly and Caudle cases were taken to the Supreme Court on this very point, and certiorari was denied (356 U. S. 921; 2 Law. Ed. 2d 716).

Certainly a defendant in a criminal case would be entitled to more protection in this connection than a litigant in a civil case.

It is true that in the Connelly case, the Court of Appeals pointed out that, "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions" presented, and then proceeded to point out wherein the Connelly and Caudle cases did not involve that type of record. This discussion, and the conclusions reached therein, were in connection with passing upon the trial judge's exercise of discretion in undertaking to pass upon the defendant's motion for a new trial pursuant to Rule 25, as the successor to the trial judge who had died subsequent to the jury trial itself.

In other words, the validity of Rules 25 and 63 was clearly upheld, and have been consistently upheld by many decisions. Therefore, the only question that can be raised in this connection, and the only questions that can properly be raised here, is whether or not the successor trial judge (Hon. William E. Miller) abused his discretion and acted arbitrarily in undertaking to pass upon the plaintiffs' motions for a new trial.

The Factual Issue as to the Speed of the Defendant's Train.

In attempting to demonstrate that Judge Miller, the successor trial judge, should not have passed upon the plaintiffs' motions for a new trial, opposing counsel predi-

cates his argument upon the theory that the single determinative issue in the jury trials, which resulted in favorable verdicts for the defendant Railroad Company, was the question of the speed of the defendant's train.

It is true that there was conflicting evidence as to the speed of defendant's train but, as will be pointed out more fully hereinbelow, that issue of fact was, by no means, the real determinative issue. Even if that factual issue had been the determinative issue in the jury trial, there is no possible basis for the contention that a finding by the jury that the train was not running at an excessive rate of speed was against the palpable and manifest weight of the evidence, or that it was based on any false testimony. As is pointed out on pages 8 and 9 of opposing counsel's petition, the engineer and fireman who were operating the defendant's train, who had had many years experience operating railroad trains, and who had a speedometer before them, testified that they had reduced the speed of the train to 30 miles per hour upon entering the corporate limits of the City of Springfield. The defendant also introduced testimony that the movement of all trains on this particular line was recorded at the Dispatcher's Office at Evansville, Indiana, by an electronic Central Traffic Control System, and that from the traingraph thus produced it was his best **estimate** that the train traveled a distance of approximately a half a mile just before reaching the crossing in the elapsed time of approximately one minute. On cross-examination, the plaintiffs' attorney brought out from this witness that his testimony to that effect was only an estimate and that it could vary, for even the distance of half a mile a few seconds one way or the other. Estimates for distances substantially shorter than half a mile would, obviously, be impractical, with little or no probative value. (Appellant's Appendix, p. 64a, et seq.; Appellee's Appendix, pp. 50b and 51b.)

Now the only evidence introduced on behalf of the plaintiffs that the train was running at an excessive speed was

the estimate made by one Roy Ashbranner, a City policeman, of Springfield, who had never had any railroad experience, and who was simply making an estimate of the speed of the train by watching its approaching headlight coming directly towards him. (Appendix to Main Brief of Appellants, p. 19a.) It is true that plaintiffs also introduced a professor of the Engineering Department of Vanderbilt University, who had never operated a train of the type involved, and who attempted to work out a formula by which he purportedly demonstrated that the length of time it took the train to come to a stop under a "service application", indicated that the train was running at a higher rate of speed than testified by the crew. The testimony of the alleged expert was severely criticized by the Court of Appeals for the Sixth Circuit on the first appeal, when the plaintiffs' verdicts in these two cases were reversed. (**L&N Railroad Company v. Farmer**, 220 F. 2d 90.) In fact, the admission of the testimony of this alleged expert on air brakes was one of the grounds on which the Court of Appeals reversed the jury verdicts for the plaintiffs on the first trial. We submit that there was no substantial difference in the manner in which this same testimony was submitted on the second trial, and that the trial court's admission thereof, in the second trial, was prejudicial, and if the plaintiffs had been successful in obtaining verdicts that the submission of that testimony would have been reversible error.

It is difficult, therefore, on the face of the record, as above set forth, to see how opposing counsel can make the contention that the conclusion of the jury (assuming that it reached such a conclusion) that the testimony of the fireman and the engineer, who were in a position to know the speed of the train, and the supporting testimony of the Dispatcher "were manifestly and palpably against the weight of evidence" or that the testimony of the defendant's witnesses was false.

In a further effort to press this point, opposing counsel from time to time in his brief, makes reference to certain color slide pictures of a portion of the traingraph, made by opposing counsel after the verdicts for the defendant Railroad Company, at the second trial, and certain supporting affidavits made by him and another, all executed and filed subsequent to the verdicts for the defendant Railroad Company, in support of one of the plaintiffs' grounds for a new trial, to-wit, newly discovered evidence.

Although plaintiffs' attorney knew of the existence of the traingraph and had taken discovery interrogatories concerning it on two occasions prior to the trial, the theory supposedly supported by the color slide and the affidavits referred to, were not presented to the jury during the actual trial, and impressed neither the successor trial judge, Judge Miller, nor the Court of Appeals, as presenting any sort of determinative evidence whatsoever. In the actual trial of the case before the jury, it was opposing counsel's position, as demonstrated by his cross-examination of the defendant's Dispatcher, that estimates of the speed of a train for a distance of a half a mile, on the basis of the traingraph, could vary and were not too reliable, but, now, on the basis of affidavits of himself and others, and a color picture of a minute part of that traingraph, partially obscured by a tiny ink spot, opposing counsel contends that an accurate conclusion of the speed of the train can be made for a distance of only **295 feet**.

The inference contained on page 20 of opposing counsel's brief, that an employee of the Railroad "had blotted out" that tiny portion of the graph is utterly without foundation. Quite naturally a tiny ink blot resulted where one ink pen line crossed another.

The Speed of the Train Is Not the Determinative Issue in This Case.

Even if the jury concluded that the crew was not keeping a proper look-out ahead, or that the train was running

at an excessive rate of speed, nevertheless, there is substantial other evidence in this record, much of it undisputed, that would not only have justified, but would have required verdicts for the defendant Railroad Company, on all counts, that is under the Statutory Count, the Common Law Count and the Count based on the Springfield City Speed Ordinance.

As pointed out hereinabove, the undisputed evidence, including the evidence of the plaintiffs' own witnesses, was that the automobile in which the boys were riding, after stopping at a point of complete safety, "lunged" or "jumped" right into the path of the train when the operator of the car "mashed on the gas". In fact, the right front corner of the engine struck the left front corner of the automobile. If the jury concluded, which they certainly would have been justified in doing, that "the appearance of the automobile upon the railroad track was practically simultaneous with the collision, and no opportunity was afforded the crew of the defendant's railroad train to comply with all of the precautions required, the defendant Railroad Company would not be liable under the Statute. **Gaines v. T. C. Railroad Company,** 175 Tenn. 389, p. 393; **Jones v. Louisville and Nashville Railroad Company,** 192 Tenn. 570. The undisputed evidence seems so overwhelming on this point that we submit that the trial court would have been justified in directing a verdict for the defendant Railroad Company in that connection. Directed verdicts for the defendant on that ground were affirmed in the **Gaines** case, supra, and in the **Jones** case, supra.

With respect to the Counts in the plaintiffs' complaint based on Common Law negligence and on the alleged violation of the Springfield City Speed Ordinance, it is well established, of course, that the plaintiffs' right of action to recover would be completely barred if the deceased were guilty of contributory negligence which was one of

the proximate causes of the accident. **McCampbell v. Central of Georgia Railway Co.**, 194 Tenn. 594, at p. 599. In fact, by a supplemental opinion of the Court of Appeals for the Sixth Circuit, in this case, on a petition for a rehearing on the first appeal the Court of Appeals held that, under the record in that case, it was clear that the operator of the automobile was guilty of contributory negligence as a matter of law, and, if, on the second trial, nothing more was adduced in favor of the plaintiffs that the trial court should direct a verdict for the defendant Railroad Company on the Common Law Count and on the Springfield City Speed Ordinance Count with respect to the case brought for the death of the Farmer boy who was driving the car.

With respect to the case brought for the death of the Farmer boy who was a passenger in the car, of course, it is well established in Tennessee, that a guest is not entitled to rely entirely on the operator of the automobile, but is under some duty to exercise reasonable care for his own safety. (**Crawford v. Nashville etc. Railway**, 153 Tenn. 642.) One of the boys who survived the accident testified that at the time the automobile in which they were riding came to a stop at a point of complete safety, the crossing warning signals were going full blast, the train was approaching in clear view, with its lights glaring into the boys' faces, and the horn of the engine blowing, the Farmer boy, who was riding on the front seat of the automobile shouted to the driver, "Go ahead" (Appellee's Appendix, pp. 55b and 56b).

Thus, irrespective of speed the jury would not only have been justified, but, in our opinion, required to have rejected the plaintiffs' cases, for the reasons immediately hereinabove set forth. The speed of the train was not, therefore, the single determinative issue of fact.

Petitioners' Entire Position Is Prejudicated Upon the Erroneous Position That a Trial Judge in the Federal Court Acts as a "Thirteenth Juror", Should Make His Own Determination of the Credibility of Witnesses Who Appeared Before the Jury, and Should Grant a New Trial if He, the Trial Judge, Had He Been Sitting on the Jury, Would Have Reached a Different Verdict.

The Court of Appeals for the Sixth Circuit, in the case of **Werthan Bag Corp. v. Agnew**, 202 F. 2d 119, in commenting on the trial Judge's remarks that, in the Federal Court, the trial judge did not act as a "thirteenth juror", said:

> "The judge continued: 'It is different in the Federal court. It is a question of whether or not there is substantial evidence here, and not like the State practice (Tennessee), I am not the thirteenth juror, and it is not necessary for me to approve or disapprove a verdict on the record.' This was a correct statement of law, for, though it has long been the rule in Tennessee that the trial judge is a thirteenth juror and unless satisfied with the verdict should set it aside, *no such rule exists in the United States courts.* (Italics added.)
>
> * * * * * * * *
>
> "In Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, the Supreme Court declared: 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'"

To the same effect, see **City of Knoxville, Tennessee v. Bailey**, 222 F. 2d 520 (C. C. A. 6); **Peterman v. Indian Motorcycle Company**, 216 F. 2d 289 (C. C. A. ...); **Mahoney v. New York Central Railroad** (C. C. A. 2), 234 F. 2d 929; and **Norfolk So. Ry. Co. v. Dan's Frozen Foods**, 195 F. 2d 662 (C. C. A. ...).

Moore, in his work on **Federal Practice** (Second Edition), Volume 6, page 3818, summarizes the well established law on this point, as follows:

> "There are statements in the cases that, in ruling on the motion, the trial judge acts as a thirteenth juror. Properly understood and applied, no fault can be found with them for the judge does not act to evaluate and weigh the evidence. But while he has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of the fact, he would have reached a different result; and in that sense he does not act as a thirteenth juror in approving or disapproving the verdict. And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict."

A succinct statement or summary of this principle is also found in **Cyclopedia of Federal Procedure** (Third Edition), Volume 10, p. 79:

> "The testimony is considered in the light most advantageous to the prevailing party and all conflicts in the evidence must be resolved in his favor. *It is not a sufficient ground for a new trial that the verdict is against the preponderance of the testimony, or that the court might have arrived at a different result. The verdict must be manifestly and palpably against the evidence.*" (Italics added.)

CONCLUSION.

The overwhelming weight of the evidence was in favor of the defendant and in support of the jury's verdicts in these cases. Indeed, on the basis of the undisputed testimony, it is extremely difficult to see how the jury could have reached any verdict except for the defendant Rail-

road Company. The transcript of the entire proceedings was written up by the defendant and provided the Court for study when passing upon the plaintiffs' motions for a new trial after the adverse verdicts, in favor of the defendant. This matter was briefed at great length by both counsel. That the verdicts were in accordance with the overwhelming weight of the evidence would be crystal clear to anyone reading the record.

Stripped of all surplusage and all irrelevances, the real and only issue presented by petitioners on this petition for a writ of certiorari, is whether or not the successor trial judge, the Hon. William E. Miller, in reaching the conclusion that he could fairly pass upon the plaintiffs' motions for a new trial, even though he didn't preside at the actual jury trial, itself, all as provided for in Rule 63 of the Federal Rules of Civil Procedure, abused his discretion and acted arbitrarily. The trial judge, himself, decided that he could act with fairness and propriety. The Court of Appeals for the Sixth Circuit, after considering elaborate briefs presented by both sides, and hearing full argument, likewise concluded that the trial judge did not abuse his discretion or act arbitrarily.

It is, therefore, the contention of respondent that the petition for a writ of certiorari is without merit, and that it should be denied.

Respectfully submitted,

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APPENDIX A.

(Filed Feb. 28, 1959, Carl W. Reuss, Clerk.)

Nos. 13,669; 13,670

United States Court of Appeals,
Sixth Circuit.

Floyd Farmer, Adm'r, Appellant,
v.
Louisville & Nashville Railroad Company, Appellee.

Willie Farmer, Adm'r, Appellant,
v.
Louisville & Nashville Railroad Company, Appellee.

Order.

Before Martin, Chief Judge; Simons, Circuit Judge; Mathes, District Judge.

These consolidated appeals came on to be heard on the record and on the briefs and oral arguments of attorneys for the contending parties;

And it appearing that there was substantial evidence to support the jury verdicts in favor of the defendant and that no reversible error inheres in the conduct of the trial by the district judge, or in his charge to the jury; and it appearing further that there is no valid ground for the granting of a new trial on the basis of newly discovered evidence;

The judgment of the district court in each case is affirmed.

/s/ John D. Martin,
United States Circuit Judge.